Bala Anak Matik v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q–05–43 OF 1998
ZULKEFLI, MOKHTAR SIDIN AND JAMES FOONG JJCA
9 FEBRUARY 2006

Criminal Law — Murder — Appeal against conviction and sentence — Whether there was misdirection by trial judge — Penal Code s 302

Criminal Law — Murder — Defence of grave and sudden provocation — Test to be applied — Burden on the accused to establish provocation on balance of probabilities — Whether proved on balance of probabilities — Penal Code s 300 Exception 1

Evidence — Information leading to fact discovered — Admissibility of statement — Whether prejudicial effect outweighed probative value — Whether there was any evidence of involuntariness — Evidence Act 1950 s 8

The appellant was charged on two counts of murder. At the conclusion of the trial, the appellant was convicted by the High Court in Sibu on both the above charges and was sentenced to death by hanging. The appellant appealed against the conviction and sentence of the High Court. The appellant relied on five main grounds of appeal as follows: (i) that the learned judge did not adequately consider or at all the exculpatory parts of the cautioned statement of the appellant; (ii) that the learned judge did not adequately attach the necessary weight or at all to the exculpatory parts of the cautioned statement of the appellant; that the learned judge erred in law in holding that the appellant had not discharged on a balance of probabilities the burden of proving that there was grave and sudden provocation under Exception 1 to s 300 of the Penal Code; (iii) that the learned judge erred in law in admitting the evidence leading to the discovery of the parang with some human head hairs; and (iv) that the learned judge erred in law in holding that the discovery of the parang with some human head hairs were corroborations of the cautioned statement of the most cogent kind implicating the appellant with the offences charged.

Held, dismissing the appeal:

(1) It was plain and obvious that the evidence of the appellant revealed a defence of mere denial only. Upon a careful evaluation into the totality of the evidence adduced in this case, the Court of Appeal found that the learned trial judge was correct to come to the conclusion that the defence of denial had not created any reasonable doubt in the prosecution's case (see para 10).

(2) It could not be gainsaid that the defence of grave and sudden provocation is a special exception as provided in Exception 1 to s 300 of the Penal Code. The burden of proof is explained in s 105 of the Evidence Act 1950 (see para 11). The learned trial judge had not only evaluated the defence of grave and sudden provocation under Exception 1 to s 300 of the Penal Code but also the defence of sudden fight and right of private defence. The learned trial judge was right in making the finding had not been discharged, on the balance of probabilities, the burden of proving that there was grave and sudden provocation under Exception 1 to s 300 of the Penal Code (see para 12).

(3) The threshold where the appellant in the present case must satisfy the court is on the balance of probabilities that the injuries that he had inflicted on the two deceased persons were as a result of grave and sudden provocation and not merely to cast a reasonable doubt on the prosecution case. In this context, in addition to the retraction by the appellant of the cautioned statement, there was clearly no misdirection on the part of the learned trial judge in concluding that the appellant had failed to discharge on the balance of probabilities that he came within any of the special exceptions in s 300 of the Penal Code (see para 15).

(4) Having considered the totality of the evidence both for the prosecution and the defence, the learned trial judge in rejecting the exculpatory parts of the cautioned statement was clearly supported by the evidence adduced in the whole trial. It is trite law that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly perverse which was not the case herein (see para 17).

(5) The test in *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689 could be relied upon to determine whether the appellant was provoked to lose his self-control, there must be some evidence of provocation accepted by the court to justify such an evaluation to be carried out. Apart from the bare allegations by the appellant in the exculpatory parts of the cautioned statement, there was not an iota of evidence to support the appellant's contention that he was ever provoked at all (see para 19).

(6) The learned trial judge had painstakingly tested the evidentiary value of the exculpatory parts of the cautioned statement with the totality of the evidence adduced at the trial (see para 19). There was no failure by the learned trial judge to consider the defence of sudden fight. The finding by the learned trial judge on the defence of sudden fight was clearly beyond reproach (see para 22).

(7) The information given by the appellant which led to the discovery of the parang was given by the appellant without any compulsion whatsoever. There was also no objection by the appellant as to its admissibility and more importantly, there was no evidence of any involuntariness exerted on the appellant to secure the said information. As such, there was no basis whatsoever for the appellant to complain that the prejudicial effect of the information leading to the discovery of the parang outweighed its probative value (see para 23). There was in fact a contemporaneous report lodged by the police officer on what was told to him by the appellant which led to the discovery of the parang (see para 24).

(8) The conduct of the appellant pointing to the parang as shown in the exhibit was never relied upon by the learned trial judge in coming to the decision that it corroborated the cautioned statement. It was the discovery of the parang which corroborated the cautioned statement and not otherwise. The law clearly permits such an evidence of pointing to the parang as shown in the exhibit to be admitted as conduct under s 8 of the Evidence Act 1950 (see para 26); *Prakash Chand v State* AIR 1979 Supreme Court 400 followed.

(9) Although the learned trial judge in the present case did not rely upon such an evidence as to the gesture or conduct of the appellant pointing to the parang used by him in slashing the two deceased persons, it was patently clear that such an evidence could be used to corroborate the prosecution case (see para 26).

[Bahasa Malaysia summary

Perayu telah dituduh untuk dua tuduhan membunuh. Di akhir perbicaraan, perayu telah disabitkan oleh Mahkamah Tinggi di Sibu atas kedua-dua pertuduhan tersebut dan telah dijatuhkan hukuman mati gantung. Perayu telah merayu terhadap sabitan dan hukuman Mahkamah Tinggi. Perayu telah bergantung kepada lima alasan utama rayuan seperti berikut: (i) bahawa hakim yang bijaksana tidak secukupnya atau tidak langsung menimbangkan kesemua bahagian pembebasan kenyataan beramaran perayu; (ii) hakim yang bijaksana tidak dengan mencukupi atau tiada langsung meletakkan beban ke atas bahagian pembebasan kenyataan beramaran perayu; bahawa hakim yang bijaksana terkhilaf dari segi undang-undang apabila memutuskan bahawa perayu tidak terlepas atas imbangan kebarangkalian daripada beban membuktikan terdapat provokasi yang berbahaya dan tiba-tiba di bawah Pengecualian 1 kepada s 300 Kanun Keseksaan; (iii) bahawa hakim yang bijaksana terkhilaf dari segi undang-undang apabila memasukkan keterangan yang membawa kepada penemuan parang tersebut dengan rambut kepala manusia; dan (iv) bahawa hakim yang bijaksana terkhilaf dari segi undang-undang apabila memutuskan bahawa penemuan parang dengan rambut kepala manusia menyokong kenyataan beramaran tersebut yang membabitkan perayu dengan kesalahan-kesalahan yang dituduhkan.

Diputuskan, menolak rayuan tersebut:

(1) Ia adalah jelas dan nyata bahawa keterangan perayu hanya menunjukkan satu pembelaan yang menafikan semata-matanya. Setelah meneliti secara terperinci keseluruhan keterangan yang dikemukakan dalam kes ini, Mahkamah Rayuan mendapati bahawa hakim perbicaraan yang bijaksana adalah betul apabila tiba kepada kesimpulan bahawa pembelaan penafian tersebut tidak menimbulkan apa-apa keraguan munasabah dalam kes pihak pendakwa (lihat perenggan 10).

(2) Ia tidak boleh dinafikan bahawa pembelaan provokasi yang berbahaya dan tiba-tiba adalah pengecualian istimewa dalam Pengecualian 1 kepada s 300 Kanun Keseksaan. Beban bukti dijelaskan dalam s 105 Akta Keterangan 1950 (lihat perenggan 11). Hakim perbicaraan yang bijaksana bukan sahaja telah meneliti pembelaan provokasi yang berbahaya dan tiba-tiba di bawah

Pengecualian 1 kepada s 300 Kanun Keseksaan tetapi juga pembelaan pergaduhan tiba-tiba dan hak pembelaan persendirian. Hakim perbicaraan yang bijaksana adalah betul apabila membuat penemuan yang belum dilepaskan, atas imbangan kebarangkalian, beban membuktikan bahawa terdapat provokasi yang berbahaya dan tiba-tiba di bawah Pengecualian 1 s 300 Kanun Keseksaan (lihat perenggan 12).

(3) Nilai ambang di mana perayu dalam kes semasa perlu memuaskan mahkamah adalah atas imbangan kebarangkalian bahawa kecederaan yang telah disebabkan ke atas dua orang yang mati adalah akibat provokasi yang berbahaya dan tiba-tiba dan bukan dengan hanya menimbulkan keraguan munasabah ke atas kes pihak pendakwa. Dalam konteks ini, selain daripada penarikan balik kenyataan beramaran perayu, jelas berlaku salah arah di pihak hakim perbicaraan yang bijaksana apabila memutuskan bahawa perayu telah gagal untuk melepaskan atas imbangan kebarangkalian bahawa beliau terangkum di bawah mana-mana pengecualian istimewa dalam s 300 Kanun Keseksaan (lihat perenggan 15).

(4) Setelah menimbangkan keseluruhan keterangan untuk kedua-dua pihak pendakwa dan pihak pembela, hakim perbicaraan yang bijaksana semasa menolak bahagian pembebasan kenyataan beramaran jelas disokong oleh keterangan yang dikemukakan dalam keseluruhan perbicaraan. Ia adalah undang-undang tetap bahawa satu mahkamah rayuan sepatutnya cuba tidak mengganggu penemuan fakta oleh hakim perbicaraan kecuali penemuan tersebut jelas bertentangan yang mana bukan kesnya di sini (lihat perenggan 17).

(5) Ujian dalam *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689 boleh digunakan untuk menentukan sama ada perayu telah diganggu sehingga hilang kawalan diri sendiri, perlu ada keterangan provokasi yang diterima oleh mahkamah untuk menjustifikasikan satu penilaian telah dilakukan. Selain daripada pengataan asas oleh perayu dalam bahagian pembebasan kenyataan beramaran itu, tiada keterangan untuk menyokong hujah perayu bahawa beliau telah diganggu (lihat perenggan 19).

(6) Hakim perbicaraan yang bijaksana telah menguji nilai keterangan bahagian pembebasan kenyataan beramaran dengan keseluruhan keterangan yang dikemukakan semasa perbicaraan (lihat perenggan 19). Tiada kegagalan oleh hakim perbicaraan yang bijaksana untuk menimbangkan pembelaan pergaduhan tiba-tiba. Penemuan oleh hakim perbicaraan yang bijaksana berhubung pembelaan pergaduhan tiba-tiba jelas tiada cacat celanya (lihat perenggan 22).

(7) Maklumat yang diberikan oleh perayu sehingga membawa kepada penemuan parang telah diberikan oleh perayu tanpa apa-apa paksaan. Tiada juga bantahan untuk memperoleh maklumat tersebut. Oleh itu, tiada asas untuk perayu mengadu bahawa kesan prejudis maklumat yang membawa kepada penemuan parang melebihi nilai probatifnya (lihat perenggan 23). Bahkan terdapat laporan yang sama yang telah dibuat oleh pegawai polis berhubung apa yang diberitahu kepada beliau oleh perayu yang membawa kepada penemuan parang itu (lihat perenggan 24).

(8) Perbuatan perayu menunjuk kepada parang seperti yang ditunjukkan dalam ekshibit tidak digunakan oleh hakim perbicaraan yang bijaksana apabila tiba kepada satu keputusan bahawa ia menyokong kenyataan beramaran. Ia adalah penemuan parang yang menyokong kenyataan beramaran dan bukan sebaliknya. Undang-undang jelas membenarkan keterangan sedemikian menunjuk kepada parang seperti yang ditunjukkan dalam ekshibit untuk diterima sebagai perbuatan di bawah s 8 Akta Keterangan 1950 (lihat perenggan 26); *Prakash Chand v State* AIR 1979 Supreme Court 400 diikut.

(9) Meskipun hakim perbicaraan yang bijaksana dalam kes semasa tidak bergantung kepada keterangan berhubung gerak isyarat atau perbuatan perayu menunjukkan parang yang digunakan oleh beliau untuk mengelar dua orang yang mati itu, ia amat jelas bahawa keterangan sedemikian boleh digunakan untuk menyokong kes pihak pendakwa (lihat perenggan 26).]

Notes

For cases on admissibility of statement, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1726–1733.

For cases on Penal Code s 300 Exception 1, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2136–2146.

For cases on Penal Code s 302, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2229–2260.

Cases referred to

Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689 (folld)
Francis Antonysamy v PP [2005] 3 MLJ 389 (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408 (refd)
Ikau Anak Mail v PP [1973] 2 MLJ 153 (refd)
Juraimi bin Husin v PP [1998] 1 MLJ 537 (refd)
Lim Yow Choon v PP [1972] 1 MLJ 205 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Ng Eng Kooi & Anor v PP [1970] 1 MLJ 267 (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
Prakash Chand v State AIR 1979 Supreme Court 400 (folld)
Saw Thean Teik v Regina [1953] MLJ 124 (refd)
Vijayan v PP [1975] 2 MLJ 8; [1975-1977] 1 SLR 100 (refd)

Legislation referred to

Criminal Procedure Code s 113
Evidence Act 1950 ss 8, 27, 105
Penal Code ss 300 Exception 1, 302

Appeal from: Criminal Trial No 20–47–2 of 1997 (High Court, Sibu)

Lau Hui Kui (HK Lau & Co) for the appellant.
Wong Chiang Kiat (Deputy Public Prosecutor) for the respondent.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, Bala Anak Matik was charged on two counts of murder as follows:

> First Charge
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> That you, on or about the 10th day of April, 1997 at about 10.30pm at Sungai Maaw Road, Sibu in the State of Sarawak, committed murder by causing the death of Joko Purnomo and that you thereby committed an offence punishable under ss 300, 302 of the Penal Code.
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> Second Charge
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> That you, on or about the 10th day of April, 1997 at about 10.30pm at Sungai Maaw Road, Sibu in the State of Sarawak, committed murder by causing the death of Ahmad Nuryani and that you thereby committed an offence punishable under s 302 of the Penal Code.

[2] At the conclusion of the trial, the appellant was convicted by the High Court in Sibu on both the above charges and was sentenced to death by hanging. The appellant now appeals against the conviction and sentence of the High Court.

FACTS OF THE CASE

[3] The relevant facts of the case as gathered from the evidence of the prosecution witnesses at the stage of the prosecution case are as follows.

On 10 April 1997 at about 10pm, Supriyano bin Slamat (PW19), Ahmad Nuryani (deceased) and Joko Purnomo (deceased) were on their way back to their living quarters at Fong Syn Shipyard Sibu from a Quranic class at the other branch of Fong Syn Shipyard about two kilometres away. At about 1/2 kilometre away they were suddenly attacked by a man with a parang. The evidence of PW19 is that he was walking behind Joko Purnomo and Ahmad Nuryani when suddenly the man hit his head with a parang. PW19 then turned back and saw the man whom he later identified as the appellant. He then ran away and was chased by the appellant. The appellant suddenly retreated and PW19 followed him. PW19 then saw the appellant attacked Ahmad Nuryani who was 10m away from him. He did not see who hit Joko Purnomo. Joko Purnomo ran off after Ahmad Nuryani was hit and PW19 only knew what happened to Joko Purnomo when he arrived at Fong Syn Shipyard. Although PW19 did not see who attacked Joko Purnomo, the evidence of PW11 and PW12 is that Joko Purnomo ran for help after he was attacked and was injured at the material time. Chief inspector Peter ak Umbuas (PW18) testified that on 15 May 1997 he interviewed the appellant at the Police Headquarters. From the interview, the appellant told him that on that night he hit three Indonesians with a parang. After the incident, he hid the parang beside a tree not far from the scene of the incident. Another interview was held on 16 May 1997 and the appellant still admitted attacking the Indonesians. A police party led by PW18 went to the scene of incident where the accused pointed out where he had hidden the parang (P23C).

The parang was hidden beside a tree in that area and was recovered by the police. PW18 showed the parang to the appellant and the appellant admitted that that was the parang he used to slash those Indonesians. The police in their investigation also recovered hairs from the grasp of the right hand of Ahmad Nuryani (P17C) and near the body of Ahmad Nuryani (P18C, P19C and P20C). The hair sample taken from the appellant was marked P21C. The chemist (PW2) testified that the head hairs of P17C, P18C, P19C and P20C were similar to P21C. On 15 May 1997 at about 5pm, Inspector Dzulkarnain Abdul Karim (PW6) recorded a cautioned statement (P28) from the appellant under s 113 of the Criminal Procedure Code ('the CPC'). In the cautioned statement the appellant stated that sometime after 25 February 1997, he slashed three Javanese. He alone attacked them. The reason he attacked them is that he was provoked by what was said by the Javanese. They told him that they were not afraid of Iban and the people of Sarawak and that they wanted to drink the blood of Sarawak people. This challenge started off the fight. Earlier before the fight, the appellant claimed he had bought and consumed a bottle of tuak. According to Dr Myint Soe (PW4) who performed the post-mortem, the cause of death of the deceased, Joko Purnomo is due to incised wound of right neck with severe bleeding. With regard to the deceased, Ahmad Nuryani the cause of death is due to multiple incised wounds of neck and head with severe bleeding. The injuries suffered by both the deceased would result in death and as to the instrument used PW4 stated that it could be a sharp object of considerable length like a knife.

[4] The learned trial judge at the close of the case for the prosecution ruled that the prosecution had made out a prima facie case against the appellant in respect of the first charge and the second charge and called upon the appellant to enter his defence on both the charges.

THE DEFENCE

[5] The appellant elected to give sworn evidence and in his evidence had stated, inter alia, the following relevant facts.

On 10 April 1997 at about 10pm, he was sleeping at his quarters. He did not go anywhere and did not meet anyone near his work site or meet any Indonesian. He was not aware that on that night some Indonesians were injured in a fight. He was also not engaged in any fight at the material time. The appellant also denied that he consumed any alcohol that night. The appellant testified that he was arrested in the middle of May 1997. He did not know why he was arrested by the police. In respect of the cautioned statement (P28), the appellant said that he did not make any statement to the police and that he signed P28 because he was asked to by the police. The police did not explain to him the content of P28. In his cross-examination, the appellant admitted that there were many Indonesian workers at his workplace. He disagreed that he disliked or harboured any animosity towards them. He did not know that they were paid much higher salary than him or that his superior prefers

A the Indonesian workers. In respect of the parang (P23C), the appellant said that he did not keep the parang. He disagreed that he used the parang to cause injuries to others.

GROUNDS OF APPEAL

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[6] At the hearing of the appeal before us, learned counsel of the appellant relied on five main grounds of appeal as follows:

(1) that the learned judge did not adequately consider or at all the exculpatory parts of the cautioned statement (P28) of the appellant;

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(2) that the learned judge did not adequately attach the necessary weight or at all to the exculpatory parts of the cautioned statement (P28) of the appellant;

(3) that the learned judge erred in law in holding that the appellant had not discharged on a balance of probabilities the burden of proving that there was grave and sudden provocation under Exception 1 to s 300 of the Penal Code;

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(4) that the learned judge erred in law in admitting the evidence leading to the discovery of the parang (P23C) with some human head hairs (P23E);

(5) that the learned judge erred in law in holding that the discovery of the parang (P23C) with some human head hairs (P23E) were corroborations of the cautioned statement of the most cogent kind implicating the appellant with the offences charged.

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DECISION OF THE COURT ON APPEAL

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[7] We shall deal with grounds of appeal No 1, 2 and 3 together. Under these grounds of appeal the appellant had raised the defence of grave and sudden provocation coming from both the deceased persons, Joko Purnomo and Ahmad Nuryani. It was contended for the appellant that the evidence on the grave and sudden provocation can be found in the appellant's cautioned statement (P28) and was supported by the evidence of PW18 and PW19 who found human head hairs belonging to the appellant at the scene of the incident. It was also submitted for the defence that there is no reason not to believe those parts of the evidence in P28 which are in favour of the appellant.

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[8] On the defence of grave and sudden provocation, we need at the outset state that the stand taken by the appellant when he testified under oath was that he did not give the cautioned statement marked as exhibit P28. As rightly pointed out by the learned trial judge, the appellant was in fact retracting the cautioned statement. Evidently, the appellant had resiled from the position taken in the cautioned statement and that he was not involved in the killing of the two deceased persons at all. It is trite law that the oral evidence given by the appellant in this case is the best evidence adduced by him as the truthfulness and the accuracy of the appellant could be tested by cross-examination. On this point, we would refer to the case of *Saw Thean Teik v Regina* [1953] MLJ 124 wherein Spenser Wilkinson J at p 126 had this to say:

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> Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered (see section 60 of the Evidence Ordinance). Where witnesses of this kind are brought to Court their reports should only be used, if at all, either to refresh memory or as corroboration.

Similarly, on the same point in the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273at p 282, the Federal Court held as follows:

> "In fact the prosecution called PW3, the maker of the report; by so doing, the prosecution not only had complied with the best evidence rule - the rule that the best evidence of which the subject (or the nature of thing) is capable ought to be produced - but had also afforded the appellant the benefit of cross-examining PW3, an opportunity of which erstwhile counsel for the appellant had indeed availed himself in this case."

[9] It would be enlightening at this stage to reproduce the actual evidence adduced by the appellant when he was examined by his learned counsel during the examination-in-chief. The pertinent parts of the evidence are as follows:

Q. Where were you on or about 10pm on 10 April 1997?

A. I was sleeping.

Q. What happened next?

A. I did not know what happened next

Q. Did you meet anybody near your work site at about 10pm on 10 April 1997?

A. No, I did not go anywhere.

Q. At about 10pm on 10 April 1997 were you aware that some Indonesians were injured during a fight?

A. No.

Q. Were you engaged in a fight at about 10pm on 10 April 1997?

A. No.

Q. When did you wake up from your sleep after 10pm on 10 April 1997?

A. I woke up in the morning.

Q. Were you aware some Indonesians were injured on about 10.4.97?

A. No.

Q. When were you arrested by the police?

A. Middle of May 1997.

Q. Did you know why were you arrested by the police?

A. No.

Q. Did you make any statement to the police?

A. No.

Q. P28 shown to witness. Could you have a look? Did you sign on P28?

A. They asked me to sign so I signed.

Q. Did the police explain the contents of P28?

A. No.

Q. Did you tell the police anything after you were arrested?

A. When I said that I did not do it they punched me and strangled me.

Q. What did you tell the police?

A. I did not tell them anything.

Q. Were you beaten by some Indonesians at about 10pm on 10 April 1997?

A. No.

Q. Have you ever been beaten by some Indonesians before?

A. No.

Q. Have you fought with Indonesian people?

A. No.

Q. On 10 April 1997, did you consume alcohol?

A. No.

[See pp 202–204 of the Record of Appeal].

[10] Based on the above evidence as narrated, it is abundantly clear that the appellant's evidence prevailed on the basis that he was not involved in the killing of the Joko Purnomo and Ahmad Nuryani respectively. In view of the said denial, we take the view that the defence of grave and sudden provocation could never subsist as an issue at all. It is plain and obvious that the above evidence of the appellant revealed a defence of mere denial only. Upon a careful evaluation into the totality of the evidence adduced in this case, we find that the learned trial judge was correct to come to the following conclusion which he had made as follows:

> In view of the aforesaid, I disbelieved the defence of denial. I find that this defence of denial has not created any reasonable doubt in the prosecution's case. Even if I do not believe the defence of mere denial, I find that this defence of mere denial has not created any reasonable doubt in the prosecution case (see *Mat v Public Prosecutor* [1963] 29 MLJ 263).
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> [See page 280 of the Record of Appeal].

[11] It is also the contention of learned counsel for the appellant that the learned trial judge in considering the defence of grave and sudden provocation failed to appreciate the principles as enunciated in the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. Learned counsel for the appellant contended that it was incumbent on the trial judge to carry out a separate exercise to determine whether the defence of grave and sudden provocation put up by the appellant had raised a reasonable doubt in the prosecution case. With respect, we do not agree with him. The approach adopted by learned counsel for the appellant is not a correct reflection of the principles as enunciated in *Mohamad Radhi*'s case. It could not be

gainsaid that the defence of grave and sudden provocation is a special exception as provided in Exception 1 to s 300 of the Penal Code. The burden of proof is explained in s 105 of the Evidence Act 1950 which provides as follows:

> 105. Burden of providing that the case of accused comes within exceptions.
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> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any of the special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the court shall presume in the absence of these circumstances.
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> ILLUSTRATIONS
>
> (a) …
>
> (b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self control.
>
> The burden of proof is on A.
>
> (c) …

[12] Based on the above provisions of the law applicable to this case, we noted that the learned trial judge had not only evaluated the defence of grave and sudden provocation under Exception 1 to s 300 of the Penal Code but also the defence of sudden fight and right of private defence. We find that the learned trial judge was right in making the finding as follows:

> I therefore find that the accused had not discharged, on the balance of probabilities, the burden of proving that there was grave and sudden provocation under exception 1 to section 300 of the Penal Code. In the result, the defence of grave and sudden provocation fails.
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> [See pages 286-287 of the Record of Appeal].

[13] In the case of *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153 where the defence of grave and sudden provocation was also in issue, the Federal Court, inter alia, at p 154 held as follows:

> To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the act of the deceased that the accused had been deprived of the power of self-control but such acts of provocation would also have deprived a reasonable man of the power of self-control.

It is pertinent to note that the Federal Court in the above case stipulated that the defence must satisfy the court that the accused was deprived of the power of self-control and not merely to cast a reasonable doubt in the prosecution case. The case of *Ng Eng Kooi & Anor v Public Prosecutor* [1970] 1 MLJ 267 is germane in illustrating the nature of proof required to be introduced in a defence like the present case where the Federal Court held at p 271 as follows:

> However, the distinction between 'satisfaction on a balance of probabilities' and 'satisfaction beyond reasonable doubt' is well established in the law, since the courts always stress, when the onus of proof is on the accused (for example, where he raises the defence of insanity, or where some statute puts the onus on him) that he need satisfy the jury only on the balance of probabilities.

[14] The nature of the burden on the defence was also considered in *Mohamad Radhi*'s case itself (supra) wherein at p 171, the Supreme Court (as it was then) held that:

> In the course of the prosecution case, the prosecution may of course rely on the available statutory presumption to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumption on the balance of probabilities which from the defence point of view is heavier than the burden of casting reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

The above sentiments expressed by the Supreme Court are clearly consistent with the principles as laid down in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 wherein at p 92, the Privy Council held that:

> In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it is more likely than not that the fact does not exist. The test is the same as applied in civil proceedings: the balance of probabilities.

In the Singapore's case of *Vijayan v Public Prosecutor* [1975] 2 MLJ 8; [1975-1977] 1 SLR 100 the Court of Appeal unequivocally explained the nature of the burden placed on the accused person upon a defence of provocation and it was held at p 12 as follows:

> It is needless to add that the matter must be considered objectively and that the burden is on the accused to establish provocation on a balance of probabilities.

[15] Based on the above cited case authorities, it is clear that the threshold where the appellant in the present case must satisfy the court is on the balance of probabilities that the injuries that he had inflicted on the two deceased persons were as a result of grave and sudden provocation and not merely to cast a reasonable doubt on the prosecution case. In this context, in addition to the retraction by the appellant of the cautioned statement (P28), it is our considered view that there was clearly no misdirection on the part of the learned trial judge in concluding that the appellant had failed to discharge on the balance of probabilities that he came within any of the special exceptions in s 300 of the Penal Code.

EXCULPATORY PARTS OF THE CAUTIONED STATEMENT

[16] Notwithstanding the retraction of the cautioned statement (P28) and the bare denial by the appellant in his oral testimony, we noted that the learned trial judge took the cautious approach and proceeded to scrutinize and evaluate the exculpatory parts of the cautioned statement as shown in his grounds of judgment. [See pp 281–287 of the Record of Appeal]. The learned trial judge had recited the exculpatory parts of the cautioned statement as shown in the grounds of judgment and evaluated allegations therein against the totality of the evidence adduced at the trial, including the inculpatory parts of the cautioned statement and arrived at the conclusion that the appellant failed to discharge on the balance of probabilities the defence of grave and sudden provocation, the right of private defence or the defence of sudden fight.

In the case of *Lim Yow Choon v Public Prosecutor* [1972] 1 MLJ 205at p 206, the Federal Court in a reference on questions law pertaining to the contents of a cautioned statement held that:

> In reference to the second question, we are of the view that notwithstanding that the cautioned statement was part of the evidence for the prosecution, and that there are facts in the cautioned statement which appear to contradict other parts of the evidence led by the prosecution, it was still open to the trial court as a judge of facts to assess the evidence and in so doing accept part of it and reject the rest.

[17] Having considered the totality of the evidence both for the prosecution and the defence, it is our view that the finding of facts by the learned trial judge in rejecting the exculpatory parts of the cautioned statement was clearly supported by the evidence adduced in the whole trial. Having said so, it is trite law that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly perverse which is not the case herein.

THE TEST OF GRAVE AND SUDDEN PROVOCATION

[18] In the case of *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689 his lordship Haidar JCA (as he then was) in delivering the judgment of the Court of Appeal at p 694 reiterated the test of grave and sudden provocation as follows:

> The learned judge in our view, correctly approached the defence of grave and sudden provocation in his judgment. It is in line with what had been stated by our Supreme Court in *Lorensus Tukan v PP* [1988] 1 MLJ 251 at p 253. This is what the learned judge said at page 23 (page 124 of the appeal record) of his judgment —
>
> > It is an established principle of law that the test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed, would be provoked as to lose his self-control. No abstract standard of reasonableness can be laid down. What a reasonable man would do under the circumstances depends upon the customs, manners, way of life, traditional values, etc —in short, the cultural, social and emotional background of the society in which the accused belongs. It is for the court to decide in each case having regard to all the relevant circumstances. In order to succeed, the provocation (a) be grave and sudden; and (b) have by its gravity and suddenness deprived the accused of the power of self-control."

[19] It must be borne in mind that before the above test could be relied upon to determine whether the appellant was provoked to lose his self-control, there must be some evidence of provocation accepted by the court to justify such an evaluation to be carried out. In our instant case, apart from the bare allegations by the appellant in the exculpatory parts of the cautioned statement (P28) (for which he had retracted), there was not an iota of evidence to support the appellant's contention that he was ever provoked at all. The learned trial judge had painstakingly tested the evidentiary value of the exculpatory parts of the cautioned statement with the totality of the evidence adduced at the trial and the relevant parts of his findings are reproduced as follows:

A In cross-examination, PW19 has stated that before the accused hit him he saw the accused's face. At that time, he did not talk to the accused. It was a sudden attack on him.

PW19 was not cross-examined that he (PW19), Ahmad Nuryani and Yoko Purnomo (sic) scolded the accused. It was also not put to PW19 that the three of them stated that they were not afraid of Iban and the people of Sarawak. It was also not put to PW19 that the
B three of them also said that they wanted to eat the blood of Sarawak people. PW19 was not even cross-examined that the three of them punched and kicked the accused. PW19 was also not cross-examined that the three of them kicked the accused's leg and this made him to fall down. It was also not put to PW19 that the three of them hit the accused with their legs and hands. Thus, from the evidence of PW19, it is clear that PW19, Ahmad Nuryani and Yoko Purnomo were not armed. The three of them did not carry any weapons. PW19 has
C also testified that when he was attacked by the accused with the parang there were no others at the vicinity. PW19 also testified that the attack by the accused was sudden.

[See pp 283–284 of the Record of Appeal].

D **[20]** Hence, upon the positive evidence adduced by PW19 who affirmatively testified that the three of them were attacked suddenly by the appellant on one side and the mere denials of the appellant given in his oral testimony on the other side, it is our finding that the learned trial judge was obviously correct to reject the defence of grave and sudden provocation.

E **[21]** Learned counsel for the appellant in his submission before us contended that there was insufficient judicial appreciation by the trial judge of the evidence adduced concerning 10 proven facts as raised by the defence pertaining to the defence of sudden fight. We find such a contention clearly misconceived in view of the finding made by the learned trial judge on this point. We do not find it necessary to review
F here each of the so-called 10 proven facts. It would be sufficient for us to reproduce what the learned trial judge had stated as follows:

Thus from the evidence of the prosecution, it is clear that there was no exchange of words between the deceased Ahmad Nuryani and the accused. There was also no exchange of words between PW19 and the accused. There was also no exchange of words between Yoko
G Purnomo and the accused. The fact that some head hairs of the accused were found in the right palm of the deceased Ahmad Nuryani does not support the contention that there was a fight. There was no evidence adduced on oath that the accused was injured

[See p 285 of the Record of Appeal].

H On the alleged 10 proven facts as submitted by learned counsel for the appellant to constitute the defence of sudden fight, we find that the learned trial judge had adequately considered all those pieces of evidence before coming to the conclusion as follows:

I … am of the view that the accused had not discharged, on a balance of probabilities, the burden of proving any circumstances which brought him within the general exception of right of private defence under section 96 of the Penal Code or any of the special exceptions, namely, exception 2 (the right of private defence), and 4 (sudden fight in the heat of passion upon a sudden quarrel) to section 300 of the Penal Code.

[See page 287 of the Record of Appeal]

[22] We find there was no failure by the learned trial judge to consider the defence of sudden fight as submitted by learned counsel for the appellant. The finding by the learned trial judge on the defence of sudden fight is clearly beyond reproach.

INFORMATION LEADING TO THE DISCOVERY OF PARANG (P23C)

[23] We now deal with grounds of appeal No 4 and 5 together. Learned counsel for the appellant submitted that the information given by the appellant leading to the discovery of the parang (P23C) should have been ruled inadmissible because its prejudicial effect outweighed its probative value. On this point, first and foremost, we need to categorically state here that the information given by the appellant which led to the discovery of P23C was given by the appellant without any compulsion whatsoever. There was also no objection by learned counsel for the appellant as to its admissibility and more importantly, there was no evidence of any involuntariness exerted on the appellant to secure the said information. As such, we find there is no basis whatsoever for the appellant to complain that the prejudicial effect of the information leading to the discovery of the parang outweighed its probative value. On this point in the case of *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389, the Federal Court held at p 406 that:

> The party that is seeking to have the evidence excluded in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in its favour.

Similarly, in the case of *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537, the Court of Appeal in accepting the information given by the accused held at p 571 as follows:

> Furthermore, in the present case, unlike *Md Desa*'s case, there was no challenge taken when the impugned pieces of information were adduced in evidence. If it was the first accused's case that the information he gave had been extorted from him under threat or duress, it was the duty of his counsel to have objected to their admission. It is too late in the day to now argue that the information was given in consequence of any threat, promise or inducement"

Clearly, in the present case we find there was no material before the trial judge to warrant the rejection of the information leading to the discovery of the parang.

[24] The next complaint of the appellant concerned the non-recording of the exact words used by the appellant and in support thereto, learned counsel for the appellant referred to the case of *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408. However on this point there is another case of *Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176, which addressed the same issue and also referred specifically to the case of *Hasamuddin* wherein Augustine Paul J (as he then was) at p 186 held that:

> It follows that the absence of a written record cannot affect the admissibility of the oral evidence of the information. It is of course desirable to have such a record as pointed out by the Federal Court. I consider it necessary at this stage to refer to the recent judgment of the Court of Appeal in *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408 where it was held that information given under s 27 must be exact and recorded in the language or words used by the accused. It is my view that this case is peculiar to its own facts in the

light of what I have said thus far and in particular the pronouncement by the Federal Court in *Sum Kum Seng v Public Prosecutor* [1981] 1 MLJ 244.

It would appear now that the absence of a written record cannot affect the admissibility of the oral evidence of the information. In this regard, we noted that for the present case there was in fact a contemporaneous report lodged (P35) by the police officer (PW18) on what was told to him by the appellant which led to the discovery of the parang.

[25] Still on the issue of s 27 of the Evidence Act 1950, learned counsel for the appellant submitted that the trial judge should have exercised his discretion to exclude the information given by the appellant leading to the discovery of the parang to protect the appellant's right against self-incrimination. We find that this issue had been conclusively dealt with by the apex court of this country in the case of *Francis Antonysamy v Public Prosecutor*, wherein at p 404, the Federal Court held that:

> Since voluntariness is not a condition of admissibility of information supplied under s 27 the privilege against self-incrimination which is manifested in an involuntary statement or in a statement made in breach of the requirements of s 112 must be deemed to have been impliedly abrogated insofar as s 27 is concerned. It follows that the argument of learned counsel that s 27 is subject to the voluntariness rule in s 24 and the privilege against self-incrimination in s 112 cannot be sustained

[26] It is also the submission of learned counsel for the appellant that the evidence of the appellant pointing to the parang as shown in the photograph exhibit P32D could not be used to corroborate the cautioned statement, implicating the appellant to the offence. On this point, we find that the conduct of the appellant pointing to the parang as shown in exh P32D was never relied upon by the learned trial judge in coming to the decision that it corroborated the cautioned statement. It is the discovery of the parang which corroborated the cautioned statement and not otherwise as submitted by learned counsel for the appellant. Be that as it may, we find that the law clearly permits such an evidence of pointing to the parang as shown in P32D to be admitted as conduct under s 8 s 8 of the Evidence Act 1950. On this point the Supreme Court of India in the case of *Prakash Chand v State* AIR 1979 Supreme Court 400at p 404 had this to say:

> What is excluded by s 162 of the Criminal Procedure Code is the statement made to a police officer in the course of investigation and not evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a police officer and pointed out the place where the stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible under s 8 of the Evidence Act irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of s 27 of the *Evidence Act (vide) Himachal Pradesh Administration v Om Prakash* AIR 1972 SC 975.

Although the learned trial judge in the present case did not rely upon such an evidence as to the gesture or conduct of the appellant pointing to the parang used by

him in slashing the two deceased persons, it is patently clear that such an evidence could be used to corroborate the prosecution case.

CONCLUSION

[27] There is clearly no misdirection on the part of the learned trial judge in holding that it was the appellant who caused the deaths of Joko Purnomo and Ahmad Nuryani on 10 April 1997 and that the acts that caused the deaths were murder. We therefore dismissed the appeal by the appellant and affirmed the conviction and sentence imposed by the learned trial judge.

Appeal dismissed.

Reported by Peter Ling